No. 137, Original

In The
Supreme Court of the United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING and
STATE OF NORTH DAKOTA,

Defendants.

On Exceptions To The First Interim Report Of The Special Master

WYOMING'S REPLY TO MONTANA'S EXCEPTION

BRUCE A. SALZBURG
Attorney General of Wyoming

JAY JERDE
Deputy Attorney General
DAVID J. WILLMS
Assistant Attorney General

PETER K. MICHAEL*
Senior Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-6196
pmicha@state.wy.us

**Counsel of Record*

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OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

I. Background

The State of Montana ("Montana") takes exception to two legal conclusions in the Special Master's first interim report – (1) that under the doctrine of appropriation incorporated into Article V(A) of the Yellowstone River Compact ("the Compact")[1] Wyoming irrigators with pre-1950 water rights can increase the amount of water their crops consume by converting to sprinkler irrigation systems, even if the increase reduces return flows to downstream irrigators in Montana, FIR at 38-39, 64-65, 89, ¶ 3 ("the sprinkler irrigation issue"); and (2) that Wyoming appropriators with post-1950 water rights need not curtail their diversions when downstream pre-1950 Montana appropriators are unsatisfied from the same stream, "[w]here Montana can remedy the shortages of pre-1950 appropriators in Montana through purely intrastate means that do not prejudice its other rights under the Compact. . . . FIR at 25-28, 90 ¶ 8 ("the curtailment conditions issue"). The Special Master based both of these conclusions on legal argument rather than facts developed through

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[1] Throughout this brief, the State of Wyoming ("Wyoming") will cite to the Compact as Montana did in its Exceptions and Brief. Montana's Exceptions and Brief at 4, n.1 ("Mont. Exc."). The citations will be abbreviated "Compact at" followed by the page number of Appendix A to the First Interim Report. For consistency Wyoming will also employ Montana's abbreviation of the Special Master's First Interim Report, "FIR."

discovery, which has not yet begun. The parties stipulated to the reliability of many documents that shed light on the Compact negotiations, but such documents did not contain facts on technical aspects of conversions of flood irrigation systems to sprinkler systems. *See* FIR at 3 & n.1 (referring to Joint Appendix of the parties).

II. Prior Proceedings in this Case

Montana's summary of the proceedings in this case is generally accurate, but does not mention the opportunities the Special Master gave to the parties and *amici* to present all arguments they wished to make on every issue. Montana also fails to mention that it did not present arguments on the curtailment conditions issue to the Special Master when given such opportunities. Mont. Exc. at 5-6.

This Court referred this case to the Special Master for further proceedings after Wyoming's Motion to Dismiss was fully briefed. After oral hearing, the Special Master issued a memorandum opinion. (Mem. Op. (June 2, 2009).)[2] In that opinion,

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[2] The Special Master has posted on the Stanford Law School website (http://www.stanford.edu/dept/law/mvn) most of the pleadings that the parties have submitted to him to date, and the posting is indexed clearly. The Clerk of this Court has advised Wyoming that this Court will request from the Special Master any non-posted pleadings if necessary to review those parts of the record. References to pleadings in the remainder of this brief will not repeat the website address.

he exhaustively analyzed the parties' arguments and then recommended denial of Wyoming's motion on all of Montana's claims for relief. *Id.* However, he also announced the two legal conclusions on the sprinkler irrigation and curtailment conditions issues.

Shortly after issuing the memorandum opinion, the Special Master held a status conference, during which he invited the parties, the United States and *amici* to file "letter briefs" seeking correction or clarification of various components of the memorandum opinion. (*See* Case Management Order No. 2 (June 12, 2009).) He also invited briefing on "[a]ny other issues regarding Wyoming's Motion to Dismiss that either Party believes should be addressed in the First Report to the Supreme Court and that are not fully addressed in the Memorandum Opinion." *Id.* Montana filed a lengthy brief that focused entirely on the Special Master's recommendation on the sprinkler irrigation issue, but offered no argument on the curtailment conditions issue. (Mont. Ltr. Brf. (July 17, 2009).)

In their respective responses to Montana's letter brief, Wyoming and the United States took issue with Montana's additional arguments and authorities on the sprinkler irrigation issue. (Wyo. Rsp. to Mont. Ltr. Brf. at 4-6 (Aug. 3, 2009); Ltr. Br. of U.S. at 2-4 (July 24, 2009).) Neither the United States nor Wyoming responded to the curtailment conditions issue since Montana had not raised it in its letter brief. *Id. passim.*

On September 4, 2009, the Special Master issued a 31-page supplemental opinion on Wyoming's motion to dismiss. (Supp. Op. (Sept. 4, 2009).) He devoted 28 pages to Montana's sprinkler irrigation arguments and several pages to clarifications that Wyoming had suggested in its letter brief, but he wrote nothing about the curtailment conditions he had described in his memorandum opinion, since Montana had failed to take issue with it in its letter brief. *Id.* at 3.

After briefing and argument on motions other than the motion to dismiss, the Special Master compiled a draft interim report incorporating his analysis from both his memorandum opinion and his supplemental opinion. Before submitting the final report to this Court, he asked the parties to suggest corrections to the draft. (Elec. Mail from Sp. Master's Asst. Susan Carter to all counsel (Jan. 5, 2010).) This gave Montana yet another opportunity to question the Special Master's decision on the curtailment condition issue, but Montana did not do so. (Ltr. from John Draper to Sp. Master (January 12, 2010).)

The Special Master ultimately submitted his First Interim Report to this Court on February 10, 2010. That report contained extensive analysis of the sprinkler irrigation issue drawn from both the memorandum opinion and supplemental opinion. FIR at 54-88, but lacked analysis of the curtailment conditions issue beyond what the Special Master had included in his memorandum opinion. FIR at 27-28.

SUMMARY OF ARGUMENT

Montana first takes exception to the Special Master's basic premise that Section V(A) incorporates the law of appropriation, and instead proposes that Section V(A) establishes a quantitative limit on consumptive use in Wyoming based on the amount of water that was consumed by crops in 1950. Essentially, Montana attempts to convert Section V(A) from a clause that incorporates the doctrine of appropriation into a consumption clause found in other compacts between other states. In doing so, Montana reads much of Section V(A) out of existence.

Section V(A) does not state any amount for Wyoming's alleged consumption limitation, and lacks any methodology to calculate such an amount. As defined in the Compact, the phrase "beneficial uses" simply establishes the *types* of water uses sanctioned as beneficial and protectable by the Compact, and is not an operative provision limiting any amount of consumptive water use. The Special Master, like numerous commentators before him, correctly found that the Compact does not contain any consumptive use limitations in Section V(A) or anywhere else. He therefore correctly recommended to this Court that Section V(A) incorporates the doctrine of appropriation, and under that doctrine, Wyoming irrigators with pre-1950 water rights may increase water consumption by their crops by adopting sprinkler irrigation technology without creating any Wyoming liability under the Compact.

As to Montana's second exception, Montana had two opportunities after the Special Master first recognized the curtailment conditions in his memorandum opinion to argue against them, but failed to do so. Thus, Montana waived its right to raise the issue for the first time on exception.

Montana's waiver of the curtailment conditions issue notwithstanding, the Special Master correctly found that the doctrine of appropriation requires Montana pre-1950 irrigators to satisfy their water requirements in times of low water from other Montana resources before obtaining curtailment of post-1950 Wyoming water rights, unless to do so would violate Montana's rights under the Compact. Without this balanced curtailment condition that protects post-1950 rights in Wyoming from unnecessary calls for curtailment from Montana, Montana could use the doctrine of appropriation incorporated in Section V(A) as a sword to interfere with Wyoming's rights under Section V(B) of the Compact to divert a minimum percentage of available water to its post-1950 water rights. The Special Master's curtailment conditions simply harmonized the operation of Sections V(A) and V(B).

The Court should overrule both of Montana's exceptions.

ARGUMENT

I. The Special Master Correctly Concluded that under the Doctrine of Appropriation Incorporated in Article V(A), Wyoming may Allow its Pre-1950 Appropriators to Increase Crop Consumption through Improved Irrigation Techniques without Compact Liability for any Reduced Return Flows

A. Standard of Review

The Special Master and Montana have both accurately stated the applicable standard of review for a motion to dismiss. FIR at 15-16; Mont. Exc. at 12-13. However, this Court takes a somewhat more expansive view of a motion *in the nature of* a motion to dismiss in an original action before this Court. In reviewing such a motion, the Court considers reliable documents in addition to the pleadings themselves. *New Hampshire v. Maine*, 532 U.S. 742 (2001); *United States v. Louisiana*, 363 U.S. 1, 12-13 (1960); *Arizona v. California*, 292 U.S. 341, 359-60, (1934). By moving the review of some documents forward from the post-discovery stage of proceedings to the motion to dismiss stage, the Court advances its goal of reaching the merits as soon as possible in original actions. *See Ohio v. Kentucky*, 410 U.S. 641, 644 (1973).

B. Introduction to the Compact's Overall Structure

Wyoming's motion to dismiss hinged on the meaning of Section V(A) of the Compact, so the arguments on Montana's exceptions must ultimately focus on that section. How Section V(A) fits within the overall structure of Article V is an important indicator of what the drafters intended Section V(A) to accomplish. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) (contract should be read to render all provisions consistent).

The drafting history of the Compact provides important evidence of the overall structure of Article V. *See* FIR at 30-37 (Special Master's detailed discussion of how drafters constructed Article V during negotiations). This history confirms that the drafters chose a tiered approach, under which: (1) a divertible flow methodology as described in Sections (B) and (C) governed the allocation of water to post-1950 diversions in each state; and (2) a doctrine of appropriation governed how pre-1950 rights in Montana would interact with Wyoming water rights.

During the second round of 1950 negotiations that led to the Compact, the drafters formally accepted the divertible flow methodology as a starting point. (Joint App. at 152 (meeting of Oct. 24, 1950).) This was the same general methodology that the two prior negotiating commissions had chosen for the 1942 and 1944 draft versions of the Compact that

had ultimately failed, but in 1950 the drafters made important modifications to the methodology.

The 1942 and 1944 commissions had chosen divertible flow methodologies in which the divertible flow available in each of the four interstate tributaries flowing from Wyoming into Montana would be allocated to each state by percentages. FIR at 7-8. Those commissions carefully defined the divertible flow of a river as the amount of water the irrigators and other users actually diverted from the river at their headgates on a particular day, net daily gains or losses in reservoir storage, plus the amount of water passing a stream gauge at the mouth of the river in Montana on that day. (Joint App. at 242, 258.) Each state was allowed a percentage of that daily flow, with the calculation resetting at the end of each day. *Id.* at 244-246, 261-264.

The 1942 and 1944 compacts applied this daily divertible flow formula to existing water rights that were recognized in each state as of the compacting date. They specified daily numeric mass quantity limits to which the formula would be applied in order to divide the daily flows among pre-1950 rights. *Id.* Any water remaining above these daily numeric quantities would be available for diversion to new water rights that might be established after the compacting date. *Id.* Because under the 1942 and 1944 versions, pre-compact water rights were to be regulated under the divertible flow methodology, those versions did not need to establish any other

methodology for the treatment of such pre-compact water rights.

The 1950 drafters retained the divertible flow method, but instead of applying this method to the allocation of water between pre-1950 water rights in the two states, the drafters altered the treatment of the pre-1950 and post-1950 tiers, and in Section V(B) imposed the percentage divertible flow allocation method only upon water diverted to post-1950 water rights. Compact at A-7 through A-8. The 1950 version also altered the divertible flow method from a daily method to an annual cumulative method, imposing in Article V(C) an explicit means of calculating the cumulative divertible flow to which percentage allocations would apply on any given date in the water year running from October 1 through September 30. *Id.* at A-8 through A-9.

Having chosen to apply the cumulative divertible flow method only upon post-1950 water rights, the 1950 drafters had to decide how water diverted to existing pre-1950 water rights would be handled, a task that had been unnecessary in 1942 and 1944. They provided for pre-1950 rights in Section V(A) of the Compact, by stating the such "appropriative rights" "existing in each signatory state as of January 1, 1950" "shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." Compact at A-7.

It is clear from the drafters' official minutes that they did not intend the doctrine of appropriation they imposed on pre-1950 water rights to allow a Montana diverter with an unsatisfied *pre-1950* water right to force curtailment of Wyoming irrigators who might be diverting under *pre-1950* water rights, even if those Wyoming rights were chronologically junior to the unsatisfied Montana right. (Joint App. at 71); FIR at 32-33, 56-57. Montana conceded this point at the outset of this case in its brief in support of its motion to file a bill of Complaint. (Mot. for Leave to File Bill of Compl. at 19 (January 2007).) Therefore, the question posed in Wyoming's motion to dismiss focused only on whether Montana irrigators with unsatisfied pre-1950 rights could force curtailment of Wyoming *post-1950* appropriative rights under the "doctrine of appropriation" incorporated by Article V(A).

In summary, the history of Compact negotiations demonstrates that the drafters intended Article V to create a tiered structure, separating the treatment of existing water rights as of 1950 from the treatment of water rights that would be created by new diversions and storage projects in each state after 1950. The post-1950 rights were subjected to the cumulative divertible flow methodology of Sections (B) and (C) of Article V, while pre-1950 water rights were governed by a "doctrine of appropriation" in Section V(A).

C. The Special Master's Reading of Section V(A) of the Compact

Section V(A) of the Compact consists of one sentence, straightforward in structure, and for the most part, easily understood:

> Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

Compact at A-7.

The Special Master, the United States, and Wyoming have agreed that the subject of the sentence is "appropriative rights . . . existing in each signatory State as of January 1, 1950" – in other words, water rights established under the prior appropriation systems of Montana and Wyoming with priority dates from territorial rights through January 1, 1950. (Wyo. Reply Br. at 4-8 (May 2008); Br. for U.S. at 10 (May 2008)); FIR at 16-17.

This subject, "appropriative rights," is modified by the additional clause "to the beneficial uses of the water of the Yellowstone River System." Thus, Section V(A) only protects pre-1950 water rights in Montana or Wyoming that had been established for purposes that the Compact defined as beneficial – uses that have the effect of consuming some of the water diverted "when usefully employed by the activities of

man." Compact at A-4, Art. II(H). As the Special Master correctly concluded, the Compact's definition of "beneficial use" is unremarkable, mirroring the types of uses that state governments in the western United States in the middle of the last century would recognize as sufficiently beneficial to society to merit protection against junior appropriators under the prior appropriation doctrine. FIR at 59-61; *see also* A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 5:30 (2007); Wyo. Stat. Ann. § 41-3-101 (2007); Mont. Code Ann. § 85-2-101 (2005).

The other part of the clause modifying the subject "appropriative rights" in Section V(A) is also unremarkable. The appropriative rights protected under that section are only rights to waters of the Yellowstone River System, which by Compact definition would include rights to divert water from the Tongue and Powder Rivers and their tributaries. Compact at A-3, Art. II(D).

The remainder of Section V(A) includes a verb phrase in which the drafters stated *what* would happen to pre-1950 appropriative rights when the Compact became law – such rights "shall continue to be enjoyed." The section then concludes by telling *how* the rights should "continue to be enjoyed" – "in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." It is this last clause that created the central debate in Wyoming's motion to dismiss.

Wyoming contended that the drafters intended the cumulative divertible flow methodology of Sections V(B) and V(C) to be the sole means of dividing the waters of the rivers. (Wyo. Mot. to Dismiss at 36-37 (April 2008).) Wyoming argued that the drafters intended Section V(A) to recognize the continued validity of existing pre-1950 water rights in each state, but only to be administered in each state under each state's own doctrine of appropriation. *Id.* at 42-43. Wyoming's reasoning for this intrastate application of Section V(A) need not be repeated here. *Id.* at 39-50; (Wyo. Reply Brf. on Mot. to Dismiss at 11-16 (May 2008).)

The United States contested Wyoming's position, arguing that pre-1950 Montana rights enjoyed the protection of a general, interstate "doctrine of appropriation" that the drafters incorporated in Article V(A). (Br. of U.S. at 10-21 (May 2008).) The Special Master ultimately agreed with the United States. FIR at 37, 41, 42.[3]

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[3] Although the Special Master found that the drafters intended "the doctrine of appropriation" to be a general term, not necessarily the law of either state, he also found that the laws of appropriation in Montana and Wyoming could help inform his determination of what the general doctrine entailed. FIR at 66-67, 78-85. Throughout his first interim report, he thoroughly reviewed the laws of each state, especially on the issue of whether the doctrine of appropriation would allow irrigators to increase the amount of water their crops consumed, possibly reducing return flows to a river. *Id.* His review of state law as an interpretive tool did not create a conflict between state

(Continued on following page)

Once the Special Master determined this central issue, his analysis of Montana's four claims became clear – he had to decide if each of Montana's claims alleged Wyoming acts that could result in violations of the "doctrine of appropriation" when such acts affected stream flows available to pre-1950 Montana water rights on any particular day. He decided that Montana's bill of complaint was broad enough to state three valid claims for relief because Montana alleged that its water users with pre-1950 rights had been denied water in times of scarcity because of contemporaneous diversions to post-1950 rights in Wyoming. FIR at 40-42, 52-53. Whether this might have occurred because Wyoming had allowed such competing post-1950 Wyoming diversions to be made into reservoirs, into canals or pipes serving post-1950 rights, or from post-1950 groundwater wells hydrologically connected to the river in question, the Special Master found it to be a potential violation just the same. *Id.*

Besides alleging that Wyoming diversions to *post-1950* rights might harm pre-1950 rights in Montana, Montana also alleged that Wyoming had violated or threatened to violate Section V(A) by allowing irrigators who diverted water to their land under

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law and the Compact. This Court's holding in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), that state water users may not undercut compact administration based on their state law rights is irrelevant. Mont. Exc. at 13-16, 33.

pre-1950 rights to increase the water consumption by their crops, thereby reducing return flows to the rivers flowing into Montana. (Bill of Complaint ¶ 12.) The Special Master applied his reading of Section V(A) to this sprinkler irrigation claim just as he had applied it to the other claims. He simply considered how this claim would fare under a general doctrine of appropriation. His exhaustive inquiry led him to conclude that Wyoming pre-1950 irrigators could increase water consumption through efficiency improvements. (Mem. Op. at 37-41; Supp. Op. at 3-28.)

In summary, the Special Master agreed with Wyoming and the United States that Section V(A) incorporated a doctrine of appropriation. He further decided that this doctrine had interstate application to protect Montana pre-1950 rights from Wyoming post-1950 diversions. In the end, however, that doctrine did not protect Montana pre-1950 rights from changes in consumptive use by pre-1950 Wyoming rights. To reach this last conclusion, he applied the text of Section V(A) logically to the sprinkler irrigation issue.

D. Montana's Construction of Section V(A) is Incorrect

Montana's exception to the Special Master's decision on the sprinkler irrigation issue goes to the basic premise of the Special Master's reading of Section V(A). Montana argues that Section V(A) does not incorporate a doctrine of appropriation to protect

Montana and Wyoming pre-1950 appropriative rights, but instead, establishes a quantitative limit on the total amount of water that may be consumed by crops in Wyoming fields irrigated under pre-1950 rights. Mont. Exc. at 11, 18-19. This reading of Section V(A) fails because it would: (1) change the fundamental structure of Section V(A); (2) create an amorphous quantitative limit on consumptive use of water somehow derived from the definition of "beneficial use," when the drafters could have done so simply and directly had they intended Montana's interpretation; (3) insert a depletive or consumptive use compact methodology into the Compact although the drafters expressly rejected that methodology; and (4) contradict the commentators who have unanimously stated that the Yellowstone River Compact is a divertible flow compact, not a consumptive use compact.

1. Montana's Reading of Section V(A) Changes the Fundamental Structure of the Section

In order to convert Section V(A) into a quantitative limit on consumption, Montana first changes the subject of the section from "appropriative rights," to the phrase "beneficial uses." Mont. Exc. at 11, 18-19. Montana's argument requires this substitution, because it is axiomatic under western water law that an "appropriative right" is usufructuary, and not an ownership right in water itself. *Mettler v. Ames Realty*

Co., 201 P. 702, 704 (Mont. 1921); *Mitchell Irrigation Dist. v. Sharp*, 121 F.2d 964, 967 (10th Cir. 1941).

A usufructuary right creates only a claim under which an appropriator can divert water from a stream if and when water is available to satisfy the right. A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 5:39 (Thomson/West 2007). The delivery of water in time of shortage to satisfy the downstream usufructuary right depends on whether upstream appropriators have a right to water that is superior or inferior. JOSEPH L. SAX, BARTON H. THOMPSON, JR. ET AL., LEGAL CONTROL OF WATER RESOURCES 125-26 (Thomson/West 2006). Conversely, the right of the upstream appropriator is also based on the manner in which the doctrine of appropriation prioritizes that right.

Therefore, when Article V(A) identifies the subject of its coverage as "appropriative rights," it does not imply any hard and fast amount of water to which those rights will be either entitled or limited. Rather, it merely provides that the pre-1950 rights in Montana and Wyoming will interact as dictated by the various rules of the doctrine of appropriation. Montana's argument for a hard and fast quantitative limit on pre-1950 rights in Wyoming fails if the subject of Article V(A) is "appropriative rights . . . existing in each signatory State as of January 1, 1950." *See* FIR at 60 (Special Master's discussion of distinction between an appropriative right and a guaranty of quantity).

The drafters reinforced the appropriative rights methodology of Section V(A) by making "appropriative rights" the subject of the sentence, and by stating in the final clause that pre-1950 appropriative rights shall continue to be enjoyed "in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." In his 1951 report to the United States Senate recommending enactment of the Compact, Secretary of Interior Oscar Chapman correctly summarized Section V(A) by giving voice to the subject of the section, "appropriative rights," and to the final clause that incorporates the "doctrine of appropriation:"

> Accordingly, paragraph A of article V recognizes the appropriative rights to the beneficial uses of the water of the Yellowstone River system existing in each signatory State as of January 1, 1950, and it permits the continued enjoyment of such rights in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

(Joint App. at 22.) Thus, the subject of the sentence comprising Article V(A) is "appropriative rights," and the enjoyment of those pre-1950 appropriative rights occurs under a "doctrine of appropriation."

Even after excising "appropriative rights" as the true subject of Section V(A), Montana's analysis requires more tortured reasoning to arrive at its consumptive limit interpretation. Montana could not eliminate "appropriative rights" as the subject of the

sentence without offering a substitute. Montana chooses "beneficial uses" as this substitute. Montana then contends that the drafter's definition of "beneficial use" would effectively establish a fixed consumptive limit on pre-1950 Wyoming water rights. Mont. Exc. at 18-19.

The Compact defines "beneficial use" as "that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man." Compact at A-4, Art. II(H). Montana argues that because this definition contains a form of the word "depletion," Section V(A) must employ the phrase "beneficial uses" to place a quantitative limit on water depleted by crops. Mont. Exc. at 26. The Special Master correctly rejected this analysis. FIR at 61.

Nowhere in the definition of "beneficial use" did the drafters state that it means a quantity of water depleted. Rather, they define it as a use "*by which*" the water supply of a drainage basin is depleted. Compact at A-4 (emphasis added). The drafter's definition simply recognized the principle of appropriative rights doctrine that only water applied for beneficial purposes or "uses" should be given state-sanctioned status. FIR at 61; TARLOCK, *supra* at §§ 5:30, 5:66; WYO. STAT. ANN. § 41-3-101 (2009); MONT. CODE ANN. § 85-2-102 (2005).

The traditional core list of beneficial purposes or uses includes irrigation, municipal, industrial, domestic and stock watering activities. TARLOCK,

supra at § 5:66. By only providing Section V(A) protection to "appropriative rights" for purposes that had some depletive effect, the drafters of the Compact, like most of their western state contemporaries, withheld Compact protection for any water rights that either state had, or would in the future create, for non-depletive uses, such as instream flows. For example, Wyoming did not recognize non-depletive instream flows as protectable beneficial uses of water until 1986, and its 1950 compact commissioners would surely have resisted any definition inconsistent with Wyoming law. WYO. STAT. ANN. §§ 41-3-1001 through -1014. The Special Master was correct when he decided that the definition of "beneficial use" simply established the *purposes* of water rights protected by the Compact, not an *amount* of water to be allocated under Section V(A). FIR at 59-61.

In misinterpreting the function that the phrase "beneficial uses" serves in Section V(A), Montana ignores the fact that the phrase appears not only in Section V(A), but also in Section V(B), which states in pertinent part, "the remainder of the unused and unappropriated water is allocated to each State for storage or direct diversions for beneficial use on new lands or for other purposes as follows." Section V(B) then proceeds to set percentage divertible flow limits to which each state is entitled for post-1950 rights, and is followed by Section V(C), which specifically states how the states are to quantify the cumulative divertible flows.

If the term "beneficial use" means what Montana claims – a volumetric cap on depletions – one must ask what it is doing in Section V(B), which has its own careful method of quantifying volumes based on the divertible flow concept. (*See* Joint App. at 18.) By contrast, the construction of "beneficial use" accepted by Wyoming, the United States and the Special Master makes sense within both Section V(A) and Section V(B). In Section V(B), this construction makes clear that only diversions for uses that are beneficial are counted for purposes of the post-1950 percentage allocations. Section V(A) makes clear that pre-1950 appropriative rights in each state only receive protection under the doctrine of appropriation when the water diverted under those rights is used for beneficial purposes. The appearance of the phrase "beneficial uses" in Section V(A) does not advance Montana's argument that the section creates a volumetric limit on pre-1950 water consumption in Wyoming.

2. If the Drafters had Intended to Make Article V(A) into a Consumptive Use Limit they would have done so with Simple and Practical Words

It is telling that Section V(A) lacks any simple or straightforward language that would create a volumetric limit on water consumption by Wyoming pre-1950 water rights. Montana fails to explain where in Article V(A) or in the definition of "beneficial use" water administrators or courts might find

sufficient details of its consumptive limit to make it functional. Other interstate compacts that impose such limits contain express provisions that state the amount or percentage that an upstream state may consume and also state over what time period volumes of water are to be summed so the consumptive limit can be calculated. Republican River Basin Compact art. III, 57 Stat. 86 (1943); Arkansas River Compact art. IV, 63 Stat. 145 (1949).

For example, the Upper Colorado River Basin Compact, which Wyoming negotiated in the 1940s, and which the drafters of the Yellowstone River Compact considered but rejected as a template, expressly allocates a fixed amount of water for "consumptive use" by the State of Arizona, and then allocates by percentages for consumptive use in Colorado, New Mexico, Utah and Wyoming, the water not otherwise dedicated to California, Arizona and Nevada under the Colorado River Basin Compact. Upper Colorado River Basin Compact art. III, 63 Stat. 31 (1949). It expressly provides that the apportionment is made "per annum," and states when the 12 month "water year" ends – September 30. *Id.* & art. II(a)(xi). It also defines how consumptive use is counted – by the "inflow-outflow method," based on the virgin flow at the point where the Colorado River exits the upper division states. *Id.* art. VI.

While the Upper Colorado River Basin Compact is not foolproof, it certainly demonstrates the basic parameters that drafters would include in a compact following the consumptive use methodology.

Wyoming's State Engineer L.C. Bishop acted as Wyoming's lead commissioner in the negotiation of the Upper Colorado River Basin Compact, the Snake River Compact, and the Yellowstone River Compact. WYO. STAT. ANN. §§ 41-12-401, 41-12-501, 41-12-601 (2007). Mr. Bishop and the other drafters of the Yellowstone River Compact were well aware of the alternative compacting methods available to them. (*See* Joint App. at 57, 61.) Yet, even though Wyoming negotiated the Upper Colorado River Basin Compact at the same time as the Yellowstone River Compact, Montana would have the Court believe that Wyoming accepted a consumptive use limit with none of the basic formulas that would allow implementation.

Montana attempts to overcome Article V(A)'s lack of specific consumption limits by contending that the phrase "existing in each signatory State as of January 1, 1950" creates a method to calculate such a limit. However, if the drafters intended to set a consumption limit based on the entire year of 1949, they would have stated when that water year began and ended. If they intended a limit based on average consumption over a number of water years preceding 1950, they would have said so. The same drafters who carefully crafted the formulas for post-1950 divertible flow allocation in Section V(B) would not have overlooked the need for such basic provisions in Section V(A) if they intended a consumptive use limit.

Montana also attempts to overcome the lack of language creating a consumptive use limit in Section V(A) by analogizing to the Republican River Basin

Compact. Montana contends that the definition of "beneficial use" in the Compact must create a consumptive use limit in Section V(A) because a similar definition of "beneficial consumptive use" is found in the Republican River Basin Compact, and that compact has been held to create consumptive use limits. Mont. Exc. at 15 & n.3, *citing Kansas v. Nebraska*, 530 U.S. 1272 (2000).

In making this argument, Montana confuses correlation with cause. The Republican River Basin Compact does define its term "beneficial consumptive use," similarly to the Yellowstone River Compact's definition of "beneficial use." However, while the Republican River Basin Compact may have been held to place a limit on consumption in an upstream state, its methodology does not arise from the definition of "beneficial consumptive use." Instead its methodology arises from the operative provisions of that compact. It expressly creates consumptive use limits measured in acre-feet of water: 54,100 acre-feet "allocated for beneficial consumptive use in Colorado, annually;" 190,300 acre-feet "allocated for beneficial consumptive use in Kansas, annually;" and 234,500 acre-feet "allocated for beneficial consumptive use in Nebraska, annually." Republican River Compact art. IV, 57 Stat. 86 (1943).

The Yellowstone River Compact contains no such language in Section V(A) either creating an amount of a consumptive use limit or a time frame over which such amount should be measured. Montana's reference to the Republican River Basin Compact actually

undermines its argument by showing what a compact truly limiting consumption by annual volume would look like. *See New Jersey v. Delaware*, 552 U.S. 597, 615-18 (2008) (*quoting Rocca v. Thompson*, 223 U.S. 317, 332 (1912)) ("Interstate compacts, like treaties, are presumed to be 'the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties.'").

In summary, Section V(A) of the Yellowstone River Compact lacks language supporting Montana's theory of a consumption limit on pre-1950 rights, despite Montana's suggestion that the definition of "beneficial use" could be so applied.

3. Montana's Interpretation would Create a Consumptive Use Compact, a Methodology the Drafters Expressly Rejected

Montana's contention that Section V(A) creates a consumption limit contradicts clear negotiating history. Engineering Committee Chairman Myers proposed the depletion/consumptive use principle at the August 1950 joint meeting of the commission's engineering and drafting committees. (Joint App. at 228.) He stated that the simplest kind of compact, which was most practical and easy to administer, would be a compact that puts "a ceiling on the depletion to take place upstream[.]" *Id.* Mr. Myers

drafted such a compact and circulated it to the engineering committee on September 27, 1950. (Joint App. at 196.) He incorporated the depletion concept in Article V of his draft through his use of the phrases "consumptive use," "depletions," and "inflow-outflow method" as follows:

> A. There is hereby apportioned from the Yellowstone River System . . . the consumptive use per annum of water, as follows:
>
> [blanks for percentage allocations to Montana and Wyoming on the four interstate tributaries]
>
> . . . .
>
> C. The consumptive use of water, which use is apportioned in paragraph A hereof, shall be determined for each State by the inflow-outflow method in terms of man made depletions in addition to existing depletions as of January 1, 1951.

(Joint App. at 206-07.)

The engineering committee recommended rejection of the Myers depletion draft in a letter to Commission Chairman Newell. (Joint App. at 232.) At its October 1950 meeting, the full commission considered the concept but rejected it by formal vote. *Id.* at 61. In his 1951 report to Congress accompanying the final Compact, Chairman Newell emphasized the commission's choice of divertible flow over depletion:

> In determining the amount of water subject to the allocation, the "divertible flow" principle was chosen over the "depletion" principle, because the former had been used in earlier negotiations and was more familiar to the commissioners, who were assured by the consultants that the latter had no outstanding advantages even though it had been selected on the upper Colorado.

Id. at 18.

Not surprisingly, the final Compact nowhere uses the words "consume," "consumption," or "consumptive," and only uses the term "depleted" (or its derivatives) once, in the definition of "beneficial use," which as explained above, refers to types of uses rather than amounts.

Unable to garner support for its depletion interpretation of Section V(A) from the drafters' actual negotiations, votes, or reports to Congress, Montana ventures far afield in search of something to suggest that the drafters intended that result. Montana argues that because the Compact Commission's Engineering Committee undertook reconnaissance studies during the compacting process to determine how much water was diverted and consumed in Wyoming and Montana, the drafters must have used the facts so gathered to select a consumptive limit under Section V(A). Mont. Exc. at 29. However, the fact that such due diligence occurred does not imply how the drafters would have used the results. The results might have convinced them to

either accept a methodology or reject it. The drafters rejected the depletion concept by formal vote, and instead adopted a doctrine of appropriation in Section V(A) with plain words. What they studied to get there does not contradict the result.

4. Commentators have Unanimously Identified the Yellowstone River Compact as a Divertible Flow Compact

Throughout its exception, Montana refers to other compacts, drafted by other commissions, and apportioning other rivers. While these compacts legitimately may create annual quantitative consumption or depletion limits on upstream states in their operative clauses, these clauses contain no language remotely similar to the single sentence that comprises Section V(A) of the Yellowstone River Compact. Over the six decades since the Compact's enactment, many commentators have expressly stated that the Yellowstone River Compact is not based on the depletion principle of the other compacts, and that the Compact's only mass allocation of water is its divertible flow allocation between post-1950 rights created in Section V(B).[1] One commentator explained succinctly:

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[1] *See* Richard A. Simms, Leland E. Rolfs & Brent E. Spronk, *Interstate Compacts and Equitable Apportionment*, 34 ROCKY MTN. MIN. L. INST. § 23.02[2] (1988); JEROME C. MUYS,

(Continued on following page)

> The Compact affirms and recognizes appropriative rights to the beneficial use of water of the Yellowstone River system existing in all three states as of January 1, 1950, plus supplemental water supplies. . . . *The doctrine of appropriation is recognized* and the remainder of the unused and unappropriated water is allocated to each state for storage or direct diversions by apportionment on a percentage basis of the waters of the interstate tributaries of the Yellowstone River. . . .

Henry Loble, *Interstate Water Compacts and Mineral Development (With Emphasis on the Yellowstone River*

INTERSTATE WATER COMPACTS: THE INTERSTATE COMPACT AND FEDERAL INTERSTATE COMPACT (National Water Comm'n 1971); Floyd A. Bishop, *Interstate Water Compacts and Mineral Development (Administrative Aspects)*, 21 ROCKY MTN. MIN. L. INST. 801, 802 (1975); App. A to Wyoming's Brief in Opposition to Motion for Leave to File Bill of Complaint at A-5 (Letter and white paper from Orrin Ferris, Administrator of the Water Resources Division of the Montana DNRC to Wyoming State Engineer (1976) ("The compact is explicit in allocating waters based on diversions rather than depletions, in fact, return flows are never mentioned.")); Appendix to Wyoming's Motion to Dismiss Bill of Complaint at 90 (DAN ASHENBERG, A COOPERATIVE PLAN TO ADMINISTER THE YELLOWSTONE RIVER COMPACT, (Water Resources Division, Montana DNRC Draft Report Nov. 1983) (the Compact "apportions flow based on diversions, not on depletions.")); Appendix to Wyoming's Motion to Dismiss Bill of Complaint at 91 (MONTANA DNRC, YELLOWSTONE RIVER COMPACT 32 (Nov. 29, 1989) ("The apportionment formula in Article V is based on diversions and not depletions.").

Compact), 21 ROCKY MTN. MIN. L. INST. 24 (1976) (emphasis added).

In summary, the Special Master correctly rejected Montana's reading of Section V(A) because Montana ignored vital words and incorrectly interpreted the definition of "beneficial use;" could not account for Section V(A)'s lack of provisions that would be critical to a consumption limitation; ignored the drafter's rejection of a consumption limit; and overlooked the consensus among subsequent commentators.

E. The Special Master Consistently Applied his Construction of Article V(A) to all of Montana's Claims for Relief

Montana contends in its exception that the Special Master analyzed the sprinkler irrigation issue differently than he analyzed Montana's other three claims that involved the interaction of pre-1950 rights in Montana with post-1950 rights in Wyoming. Mont. Exc. at 11, 20-25. Montana argues that the Special Master decided in its favor on those claims based on his determination that Section V(A) created a consumptive use limit on Wyoming water rights. *Id.* at 22-23.

Montana's premise is incorrect. While Montana had argued for the consumptive use limit in its briefs,[5]

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[5] (Mont. Br. in Resp. to Wyo. Mot. to Dismiss Bill of Compl. at 23-35 (May 2008) *and* Mont. Ltr. Br. at 12-15 (July 17, 2009).)

the Special Master clearly rejected it in his first interim report:

> As Wyoming notes, the drafters of the Compact chose not to require Wyoming to deliver a specific, fixed quantity of water to its border with Montana (an approach taken by Article III(d) of the Colorado River Compact, 70 Cong. Rec. 324 (1928)) *or to limit Wyoming to a specific level of consumptive use* (an approach taken by the Upper Colorado River Compact, 63 Stat. 31).

FIR at 28 (emphasis added); *see also* FIR at 59-64.

Montana supports its flawed synopsis of how the Special Master analyzed its first three claims by misreading parts of the Special Master's First Interim Report. For example, Montana claims that when the Special Master mentioned "block protection for all existing, pre-1950 appropriations," he was endorsing a quantitative consumptive use limit on irrigation by Wyoming pre-1950 rights. Mont. Exc. at 20, 23 (*quoting* FIR at 21.) Actually, he only used "block protection" as a synonym for the drafters' tiered approach in which they treated the allocation of post-1950 diversions between the states under the divertible flow method, while treating pre-1950 rights under Section V(A)'s doctrine of appropriation. In the complete sentence that Montana selectively quotes, the Special Master made clear that the drafters did *not* quantify the Section V(A) appropriations. FIR at 21. He wrote: "The final Compact provides block protection for all existing, pre-1950 appropriations,

without attempting to quantify the amounts of those appropriations, and then, after providing for supplemental appropriations for lands already under irrigation, apportions the amount that remains." *Id.* (emphasis added). Montana's unfair characterization of this quotation is further shown in the previous page of the Special Master's report, where he clearly stated that pre-1950 diversions would be governed by the doctrine of appropriation, not by a fixed quantity of consumption in the upstream state. FIR at 20.

As a result of his rejection of Montana's interpretation of Section V(A), the Special Master asked the same question with respect to all four of Montana's claims – whether "the laws governing the acquisition and use of water under the doctrine of appropriation" allowed Montana to state those claims. FIR at 38. He wrote:

> Montana's claims divide into two categories. First, Montana complains that three types of post-1950 water uses in Wyoming are interfering with Montana's pre-1950 uses: (1) irrigation of new acreage; (2) storage of water in new or expanded reservoirs, and (3) groundwater withdrawals. This section of the Report discusses these claims. Second, Montana complains that pre-1950 appropriators in Wyoming have increased their consumption of water on existing acreage to the detriment of Montana's downstream pre-1950 water uses. Because this final claim does not involve a new water use but instead involves a conflict between the water uses of

> two groups of pre-1950 appropriators, it is discussed separately in section III-D of this Report.
>
> Before examining what actions violate Article V(A), it is useful to consider in more depth what Article V(A) means by its reference to the "laws governing the acquisition and use of water under the doctrine of appropriation." Article V(A) provides not for the continued enjoyment of pre-1950 rights in the abstract but for their continued enjoyment in accordance with such laws.

Id.

The Special Master consistently applied the doctrine to each of the claims, and only reached a different result as to the sprinkler irrigation claim because of the claim's particular invalidity under the doctrine. He never accepted or applied a consumptive use limit to Section V(A). This Court should reject Montana's argument that the Special Master's analysis of its four claims relied on inconsistent reasoning.

F. The Special Master Correctly Analyzed the Sprinkler Irrigation Issue under the Doctrine of Appropriation Incorporated by Article V(A)

1. Introduction

In order to answer the question posed by Montana's fourth claim of how pre-1950 Wyoming

water rights would "continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation," the Special Master had to decide how that doctrine treated increases in consumption in 1950. Since sprinkler irrigation was in its infancy in 1950, there were no decided cases on whether an irrigator could, by installing a sprinkler system, increase the portion of legally diverted water that was actually consumed.[6] *See* FIR at 65-66. However, in 1950 there were cases and other authorities on the more general issue of

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[6] In its "Background" to its exceptions, Montana asserts that "typically" only 65% of the water applied to fields through flood irrigation is consumed by crops, and that this percentage is increased when sprinkler systems are employed, thereby reducing return flows when irrigators convert from flood to sprinkler methods. Mont. Exc. at 3. These factual assertions are unsupported by a record, and the State of Wyoming does not concede their truth. The Court should not accept or reject the Special Master's recommendations as to the sprinkler irrigation issue based on Montana's factual assertion of "typical" consumption rates or return flow outcomes. *See United States v. Louisiana*, 363 U.S. 1, 12-13 (1960) (motion in the nature of a motion to dismiss should be decided on the pleadings and reliable documents regarding negotiating history). The amount of water an irrigator diverts from a stream at the headgate at the rate allowed by his water right is always equal to or greater than the amount actually consumed by the crops, regardless of how the water is conveyed from stream to field and how it is applied to the field. *See generally* JOSEPH L. SAX, BARTON H. THOMPSON, JR. ET AL., LEGAL CONTROL OF WATER RESOURCES 128-31 (Thomson/West 2006). Thus, drafters of western interstate water compacts, and courts interpreting them, use care when distinguishing between quantities diverted and quantities consumed.

whether an irrigator could with impunity increase consumption, and correspondingly decrease return flows, through means other than sprinkler systems. *Binning v. Miller*, 102 P.2d 54 (Wyo. 1940); *see also* WELLS A. HUTCHINS, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST 365 (U.S. Gov't Printing Office 1942); I. SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES § 56 at 51 (3d ed. 1911).

Also, cases decided after 1950 have addressed the general point of increased consumption within the bounds of an irrigation water right, although as the Special Master reported, the courts have yet to address the precise question of increased consumption that results from conversion from flood to sprinkler irrigation. FIR at 77. The Special Master discussed much of this authority in his memorandum opinion and agreed with Wyoming that under the doctrine of appropriation, pre-1950 irrigators could increase the amount of water actually consumed by their crops without being subject to any curtailment demand from Montana pre-1950 irrigators. (Mem. Op. at 37-41.)

In its letter brief, Montana responded at length to the Special Master's analysis of this issue. (Mont. Ltr. Br. at 1-12 (July 17, 2009).) Montana focused on whether the Special Master properly ascertained how increased consumption should be treated under the doctrine of appropriation. *Id.* The Special Master analyzed Montana's contentions in detail, but confirmed his earlier conclusion in his supplemental opinion. (Supp. Opp. at 3 ("I remain convinced that

my ultimate conclusion in the Memorandum Opinion on the question of increased water consumption on existing irrigated acreage is correct.").)

In its exception, Montana has changed its focus, stating that the Special Master should not have even determined how the doctrine of appropriation would treat increases in consumptive use because Section V(A) creates a consumptive limit on Wyoming "beneficial uses" without regard to that doctrine. Montana states: "In light of the plain language of the Compact, it was unnecessary to delve into this issue at all." Mont. Exc. at 34.

Despite this disclaimer of relevancy, Montana devotes a small portion of its exception to some of the Special Master's analysis of the sprinkler irrigation issue. Wyoming will not burden the Court by restating and rebutting all the contentions that Montana made to the Special Master. He dealt directly with each of these contentions in his supplemental opinion and his first interim report. Wyoming will limit its discussion below to the points Montana raises in its exception.

2. The Special Master Correctly Recognized the Appropriation Doctrine's Key Distinction between Cardinal Changes in Water Rights and Changes in Irrigation Management within Basically Unchanged Water Rights

Montana continues to deny a long-established distinction in western water law between: (1) whether

an irrigator may make a cardinal change to his water right to divert from a natural stream when such change could affect the amount of water available to downstream irrigators; and (2) whether an irrigator may make operational changes in the way he delivers water from the stream, applies it to crops, or drains it from fields, thereby reducing return flows. The Special Master emphasized this distinction, explaining how all western states impose a "no injury" rule that protects downstream appropriators from decreased flows resulting from cardinal changes in upstream water rights, such as changes in the point of diversion, change in type of use, or change of place of use. FIR at 66-69. He also explained, however, that western states generally, and Wyoming specifically, does not apply the "no injury" rule to limit an irrigator's consumptive use on his land once the irrigator has diverted water from the stream in a volume within his appropriative right. FIR at 73-74, 78-82.

In its exception, Montana glosses over this distinction. It cites various authorities for the proposition that the doctrine of appropriation protects downstream irrigators through a general guarantee that stream conditions will remain as they were at the time the downstream irrigators obtained their water rights. Mont. Exc. at 34 n.5. However, the courts and commentators assert this generality in the context of attempts by upstream irrigators to make cardinal changes in their water rights. DAVID H. GETCHES, WATER LAW IN A NUTSHELL 173-75 (4th ed.

2009); A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 5:73, at 5-137 (Thomson/West 2007); WELLS A. HUTCHINS, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST 379 (U.S. Gov't Printing Office 1942); I. SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES § 498, at 532 (3d ed. 1911).

These same authorities state that the "no-injury" rule does not apply to operational changes in practices on the land in the absence of a change in the water right that governs the diversion of the water from the stream. GETCHES, *supra* at 141; TARLOCK, *supra* § 5:17, at 5-31 through 5-32 & n.11 (citing various cases including *Bower v. Big Horn Canal Ass'n*, 307 P.2d 593 (Wyo. 1957); HUTCHINS, *supra* at 365 ("Hence, the owner of the land from which the waste water flows may change his practices so as to reduce the waste, or to prevent it from flowing from his land."); WIEL, *supra* § 56 at 51.

For example, Dean Getches explains the distinction thoroughly in his text, WATER LAW IN A NUTSHELL, 139-45, 175 (4th ed. 2009). The Special Master cited this text correctly in his first interim report, but Montana contends that he mischaracterized Dean Getches' analysis. FIR at 77-78, *citing* DAVID H. GETCHES, WATER LAW IN A NUTSHELL at 144 (2009); Mont. Exc. at 34 n.8, *citing* GETCHES, *supra*. This debate between Montana and the Special Master over Dean Getches' summary of the law is clearly resolved in the Special Master's favor, as shown by Dean Getches' own words taken in fair context:

> An appropriator who seeks to change a use or to transfer a right to another for a changed use must apply to the appropriate administrative body or court for approval which must determine that there is no harm to any water user, senior or junior.
>
> . . . The doctrine of prior appropriation recognizes a right of junior appropriators "in the continuation of stream conditions as they existed at the time of their respective appropriations." Farmers Highline Canal & Reservoir Co. v. City of Golden, 272 P.2d 629 (Colo. 1954). See also Okanogan Wilderness League, Inc. v. Town of Twisp, 947 P.2d 732 (Wash. 1997).
>
> . . . .
>
> Not all actions that injure juniors are subject to the no harm rule. Reuse or more intensive consumptive use of the water on the same land for the same general purposes (e.g., agricultural irrigation), changes in use of imported water (see Section VI B of this chapter) and, in some jurisdictions, certain changes in the point of return are not protected.

DAVID H. GETCHES, WATER LAW IN A NUTSHELL 174-75 (4th ed. 2009).

> Typically, one uses only a portion of the total water diverted and returns the rest to the stream. Water rights are usually expressed as a maximum amount or rate of flow that may be diverted for a certain use

on specific land. A right may also be limited by the amount that may be consumed.[7] Within these limits, consumption may be increased by reuse so long as there is no "change of use" – a change in the place, purpose or time of use, or the means or point of diversion. Thus, an appropriator ordinarily may "recycle" irrigation return flows or capture seepage and use it within limits imposed by state law.

The upstream appropriator's increased efficiency or reuse of water on the original land can potentially reduce the downstream appropriator's supply. Downstream appropriators often are dependent on the upstream appropriator's "waste" as a source of supply. If the increased consumption came about by a change in use, it would not be allowed to harm other appropriators. But when it is the result of recapture and reuse or conservation measures on the same land, it will be permitted without regard to harm caused to others so long as the amount diverted (and the amount consumed, if it has

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[7] Since long before 1950, Wyoming water rights have been formalized in permits and certificates of appropriation. WYO. STAT. ANN. §§ 41-4-501 through -517. The rights expressed in such documents are quantified by the flow an irrigator can withdraw from the stream at his point of diversion. Wyoming has always tabulated and regulated irrigation water rights from streams by the amount diverted, not the amount actually consumed, so Dean Getches' parentheticals indicating the possibility of water rights founded on consumption must involve some other state and are not relevant here.

> been quantified) does not exceed one's "paper right" (i.e., the amount specified in a permit or court decree). The applicable principle is that a junior appropriator who depends on a senior's waste as a source of supply is subject to the waste being curtailed. See Thayer v. City of Rawlins, 594 P.2d 951 (Wyo. 1979). . . .

GETCHES, *supra* at 140-41.

> The rule allowing recapture and resuse of salvaged water on the original land can result in more water being consumed. For instance, if a water user is consuming less than the permitted amount of water and plants a more water-intensive crop or puts in a more efficient irrigation system, most or all of the water that had previously been returned to the stream might be consumed. This can deprive other appropriators of water on which they depend but it is allowed since it is technically within the terms of the original appropriation.

GETCHES, *supra* at 143-44.

A century ago, Samuel Wiel explained the logic drawn from the doctrine of appropriation that prevents the no-injury rule from restricting the amount of water an irrigator may consume once he has reduced water from a natural stream to his possession. He wrote that while the water is in the natural stream it "belongs to the public" and is open to appropriation. But once the water is appropriated by diversion at a headgate and placed in a ditch,

reservoir, pipe or other artificial structure, the irrigator has reduced the *corpus* of the water to ownership. WIEL, *supra* § 52 at 46. Once reduced to ownership, the water is "subject only to such rights of continuance as are derived through the man who carries it and causes it to flow there," and the public loses the right to make claim to it as long as it remains in the possession of its owner. WIEL, *supra* § 53 at 47. The process of consumption, through sprinkler irrigation or otherwise, occurs on the irrigator's land while the water remains in his possession, so he may consume to extinction, if he can.

The Special Master made two policy arguments that support the consensus expressed by Dean Getches and the other commentators. First, the right to unfettered consumption bounded only by the irrigator's appropriative right to divert a particular quantity from the stream encourages irrigators to improve their efficiency in a water-short region. Second, a contrary rule would be very difficult to apply because it would require constant monitoring of irrigation practices on far-flung farm and ranch lands, as compared to the current system of only monitoring quantities of diversions at headgates. FIR at 69-70.

In summary, the Special Master correctly concluded that the Compact drafters intended the doctrine of appropriation incorporated in Section V(A) to allow for increases in consumption by irrigators in the upstream state holding pre-1950 rights. The

Court should accept his recommendation on the sprinkler irrigation issue.

II. This Court should Accept the Special Master's Recommendation that when Montana Irrigators with Pre-1950 Rights do not Receive Sufficient Water to Satisfy those Rights Due to Low Stream Conditions, Montana should First Attempt to Obtain the Necessary Water from within Montana

The second issue that Montana raised in its exception involves a condition the Special Master placed on the ability of Montana to seek a curtailment of Wyoming post-1950 diversions when Montana pre-1950 diversions are short of water at their points of diversion. The Special Master recommended that no curtailment should occur if Montana could overcome the shortage with its own resources, so long as Montana's application of those resources does not result in Montana foregoing other rights under the Compact. FIR at 89. The Court should reject Montana's exception to these curtailment conditions because Montana waived the argument and because the conditions are necessary to harmonize the application of Sections V(A) and V(B).

A. Montana Waived its Exception on this Issue by Failing to Raise it Before the Special Master

The arguments Montana raises in its exception to the Special Master's curtailment conditions have not been previously briefed by either Wyoming, the United States or any *amici*, because Montana raises those arguments here for the first time. Since the Special Master had no chance to consider Montana's arguments or to amplify his explanation for his recommendation in response to such arguments, this Court should deny Montana's exception based on waiver.

If Montana had lacked opportunity to raise its objections to the curtailment conditions that the Special Master announced in his June 2, 2009 memorandum opinion, then no waiver would have occurred. However, as recounted above in the summary of the course of proceedings in this case, Montana had two invitations to argue against the Special Master's recommendation on this issue but failed to do so. Montana certainly knew how to object to anything the Special Master included in his the memorandum opinion. It submitted a lengthy brief on the sprinkler irrigation issue and received 28 pages of exhaustive analysis from the Special Master in response. (Mont. Ltr. Br. at 1-12 (July 17, 2009); Supp. Mem. 1-28 (Sept. 4, 2009).)

Although this Court has not specifically addressed the issue of waiver for failure to argue a

point below in the context of a Special Master's recommendation, it has found waiver in the appellate context. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992) (*citing Youakim v. Miller*, 425 U.S. 231, 234 (1976)) (*per curium*).

Lower federal courts have held that waiver for failure to raise an issue below applies when the court employs a special master or magistrate judge to make a recommended decision. *Hellenbrand-Sztaba v. Sec'y of Health and Human Servs.*, 35 Fed. Cl. 222, 225 (1996) (special master); *Borden v. Sec'y of Health and Human Servs.*, 836 F.2d 4, 6 (1st Cir. 1987) (magistrate judge).

The United States Court of Appeals for the First Circuit has held that a litigant may not advance for the first time in a district court an argument against a recommendation from a magistrate judge to that court, unless the litigant made that argument to the magistrate judge in the proceedings before him. *Borden*, 836 F.2d at 6. The court explained:

> Appellant was entitled to a de novo review by the district court of the *recommendations to which he objected*, *see Mathews v. Weber*, 423 U.S. 261, . . . however he was not entitled to a de novo review of an argument never raised. *See Singh v. Superintending School Committee*, 593 F. Supp. 1315, 1318 (D. Me. 1984); [other citations] "The purpose of the Federal Magistrate's Act is to relieve courts of unnecessary work." *Park Motor Mart, Inc. v.*

> *Ford Motor Co.*, 616 F.2d 603, 605 (1st Cir. 1980). It would defeat this purpose if the district court was required to hear matters anew on issues never presented to the magistrate. Parties must take before the magistrate, "not only their 'best shot' but all of their shots." *Singh*, 593 F. Supp. at 1318. This concept is premised on the same basis as the rule that an appellate court will not consider arguments not raised below except in the most compelling circumstances.

Id.

This Court appointed Special Master Thompson for the express purpose of conducting all proceedings on the motion to dismiss as well as subsequent proceedings, no doubt relying on his background in the specialty of water law to ensure that sound and thoughtful recommendations would reach this Court. While the Special Master's recommendations are not immune from critique by the Court upon exception, surely the time and effort spent by a specialist like the Special Master economizes on the Court's time. The Special Master's exhaustive written review of Montana's multiple briefings of the sprinkler system issue amply demonstrates the contribution of his appointment to the goal of judicial economy.

The purposes behind the Special Master's appointment would be circumvented if Montana could withhold argument from the Special Master despite repeated opportunity, and raise the argument for the first time before this Court. Montana's exception on

the curtailment conditions issue should be denied because Montana has through silence before the Special Master waived the right to take such exception.

B. The Special Master's Decision on the Curtailment Conditions Balanced Montana's Appropriative Rights under Article V(A) with Wyoming's Rights to Percentage Allocations under Article V(B)

As explained above, the Special Master, Wyoming, and the United States have all read Article V(A) to mean that pre-1950 appropriative water rights in both Montana and Wyoming "shall" continue to be enjoyed under "the laws governing the acquisition and use of water under the doctrine of appropriation." Disagreeing with Wyoming, however, the Special Master recommended that "the doctrine of appropriation" incorporated in Article V(A) allowed Montana to claim injury if it could show that Wyoming diversions to post-1950 rights interfered with flows that would otherwise be available for diversion by pre-1950 Montana rights downstream. FIR at 17, 29.

In rejecting Wyoming's argument, the Special Master had to overcome a practical argument Wyoming had made in support of its position. Wyoming correctly emphasized that Article V(B) of the Compact guarantees that through any given date in a given water year, Wyoming water users with

post-1950 rights are allotted 40% of the cumulative annual divertible flow on the Tongue River, and 42% on the Powder River. (Wyo. Br. on Mot. To Dismiss at 46-47 (April 2008).) If a Montana irrigator with a pre-1950 water right could make a call under Article V(A) that closed a Wyoming post-1950 headgate, even though Wyoming's cumulative diversion through that date was below its Article V(B) percentage entitlement, then Montana could use "the doctrine of appropriation" in Article V(A) as a sword to undermine Wyoming's percentage entitlement under Article V(B). *Id.*

The Special Master apparently accepted this concern, because he did not recommend that Montana could always call off post-1950 diversions in Wyoming to satisfy its pre-1950 diverter who could thereby benefit. Instead, he held that a water shortage affecting a Montana pre-1950 right should usually be remedied by intrastate means within Montana rather than by a call to Wyoming to curtail any post-1950 Wyoming diversions in operation. FIR at 27. He wrote:

> Although Wyoming's "self-correction" argument does not undermine either the meaning of or the need for Article V(A), the argument illustrates that Montana may not always need to invoke Article V(A) to protect its pre-1950 uses. Under what circumstances Wyoming must respond to shortages suffered by pre-1950 appropriators in Montana by immediately reducing post-1950 diversions or withdrawals in Wyoming is a factual

> inquiry. Where Montana can remedy the shortages of pre-1950 appropriators in Montana through purely intrastate means that do not prejudice its other rights under the Compact, an intrastate remedy is the appropriate solution. Where this is not possible, however, the Compact requires that Wyoming ensure that new uses in Wyoming do not interfere with pre-1950 appropriations in Montana. The questions of when "intrastate" remedies are adequate under the Compact and, alternatively, when Wyoming must curtail post-1950 uses pursuant to Article V(A), are best addressed in subsequent proceedings in this case after discovery is complete and an appropriate factual record can be developed.

Id. at 27-28.

By deciding that "the doctrine of appropriation" incorporated in Article V(A) had interstate reach, the Special Master did not completely ameliorate Wyoming's concern about potential loss of its V(B) percentage allocations through a Montana call under V(A). However, the Special Master's curtailment conditions do prevent the prior appropriation doctrine incorporated in Article V(A) from significantly interfering with Wyoming's V(B) allocations. Thus, the Special Master's recommendation vindicates the "cardinal principle of contract construction," "that a document should be read to give effect to all its provisions and to render them consistent with each other." *See Mastrobuono v. Shearson Lehman Hutton,*

Inc., 514 U.S. 52, 63 (1995). This cardinal principle is applicable to the Compact, which is both a contract and a law of the United States. *See Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.1 (1991).

C. Montana Exaggerates Practical Concerns with the Special Master's Curtailment Conditions

Montana suggests that the requirement that Montana pre-1950 irrigators first satisfy shortages from other Montana resources is impractical because Montana will have to prove that it has investigated its own intrastate resources before Wyoming must curtail its post-1950 diversions. Mont. Exc. at 39-40. This suggestion lacks merit.

Montana, like Wyoming, is a state that employs the doctrine of prior appropriation in its intrastate water management. Under that doctrine, it should be within the normal course of events for Montana water managers to explore whether a Montana post-1950 irrigator is depleting a river upstream of a senior pre-1950 irrigator's diversion point when the latter lacks adequate flow to satisfy his right. *See* MONT. CODE. ANN. §§ 85-2-112 through -113 (duties of Montana Dep't of Natural Res. to administer water rights); *see also* WYO. STAT. ANN. § 41-3-503 (authority of Wyoming water division superintendents to enforce rights of priority of appropriation) *and* § 41-3-603 (authority of Wyoming water commissioners to divide water in streams based on lawful entitlement). This

is simply basic administration under prior appropriation. If in their administration, Montana officials determine that no Montana resource is available to curtail in order to satisfy a pre-1950 right, then Montana will be poised to make demand on Wyoming. The Special Master's requirement of Montana due diligence preceding a curtailment call on Wyoming adds no extraordinary burdens on Montana.

Moreover, Article V(B) of the Compact already requires both states to measure quantities of post-1950 diversions at all headgates whenever there is a concern about violation of the percentage allocations of divertible flow. In fact, shortly after the Compact's enactment the Montana Legislature passed an act requiring post-1950 diverters to install measuring devices for this very purpose. MONT. CODE ANN. §§ 85-20-102 through -106. Checking on contemporaneous post-1950 diversions in Montana to protect pre-1950 rights during low water conditions prior to asserting a call on Wyoming is likely less arduous than compiling statistics of cumulative diversions under V(B).

The members of Montana's delegation that negotiated the Compact were well-versed in Montana prior appropriation law and implementation and surely would not be surprised that the Special Master would recommend that Article V(A) requires some due diligence by Montana when it seeks a Wyoming curtailment in order to benefit from the doctrine of appropriation. Having obtained a recommendation

from the Special Master that the laws governing the doctrine of appropriation incorporated in Article V(A) create a general doctrine of appropriation that allows interstate curtailment, Montana cannot now deny the components of that doctrine which the Special Master has found to be necessary to make the Compact function with internal consistency.

D. This Court should not Rely on Interpretations of other Compacts that do not Contain Language Similar to Article V(A)

Montana contends that the Special Master's requirement that Montana's pre-1950 rights generally seek intrastate satisfaction is inconsistent with what other interstate compacts provide. (Mont. Exc. at 38) Again, Montana looks to the wrong documents for guidance. *See New Jersey v. Delaware*, 552 U.S. 597, 615-18 (2008). While it is true that compacts that require delivery of an annual volume of water at the state line would not trigger downstream regulation as a condition of delivery, the Yellowstone River Compact is not such a compact.

Section V(A) provides that appropriative rights are to be enjoyed under the "laws governing the acquisition and use of water under the doctrine of appropriation." Compact at A-7. The doctrine generally requires that those who assert a claim against upstream appropriators for curtailment of their diversions have a need for that water. JOSEPH L. SAX,

BARTON H. THOMPSON, JR. ET AL., LEGAL CONTROL OF WATER RESOURCES 126, ¶ 8. (Thomson/West 2006). The Special Master's curtailment conditions simply adopt this principle by requiring Montana to have its house in order with respect to its pre-1950 rights before demanding that Wyoming curtail its post-1950 diversions. The Court should reject Montana's exception on this issue.

CONCLUSION

The Court should accept the Special Master's First Interim Report in its entirety, and enter an order on Wyoming's motion to dismiss in the form proposed by the Special Master.

Respectfully submitted,

BRUCE A. SALZBURG
Attorney General of Wyoming

JAY JERDE
Deputy Attorney General
DAVID J. WILLMS
Assistant Attorney General

PETER K. MICHAEL*
Senior Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-6196
pmicha@state.wy.us

Counsel of Record

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